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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOHN E. COMBS,

Plaintiff,

v.

PROGRESSIVE d/b/a PROGRESSIVE  
NORTHWESTERN INSURANCE  
COMPANY,

Defendant.

Case No. C08-5632FDB

ORDER OF REMAND

The Court ordered the parties to show cause why this matter should not be remanded to Pierce County Superior Court, as it appeared that this case had been untimely removed (cause of action removed October 17, 2008, more than 30 days from September 8, 2008, the date Defendant received the Complaint).

PARTIES' RESPONSES TO SHOW CAUSE ORDER

Defendant Progressive responded to the show cause order that the initial pleading, the Complaint that Defendant received on September 8, 2008, did not show that this cause of action was removable because while there was diversity of citizenship, the amount in controversy was not apparent.

1 Plaintiff Combs responded to the show cause order that as early as July 24, 2008, his counsel  
2 provided to Progressive Plaintiff's demand letter to Metropolitan Insurance Company, which stated  
3 general and special damages between \$1,130,000 and \$1,180,000 and offered to settle with  
4 Metropolitan for \$250,000. Plaintiff's counsel indicated that Metropolitan did not accept Plaintiff's  
5 settlement demand. Plaintiff's counsel further stated in the letter that given the nature and extent of  
6 Plaintiff's injuries, he was concerned that the Metropolitan policy of \$250,000 was insufficient and  
7 that Plaintiff would be required to apply for coverage under his own UM policy with Progressive.

8 Arbitration of the matter ensued, and Progressive admits to learning that the arbitrator  
9 determined that Combs' damages totaled \$406,000. Subtracting Metropolitan's \$250,000 policy  
10 limits left a balance of \$161,000. Progressive argues, however, that this information came by  
11 telephone and not in the form of a pleading, motion, or other paper as set forth in the removal  
12 provision (28 U.S.C. § 1446(b) .

13 Plaintiff's complaint against Progressive alleged that a 1986 Chevrolet pick-up truck  
14 "violently collided into the driver's side" of his 1998 Ford Expedition SUV as he was driving  
15 through an intersection with a green light. Plaintiff further alleged that he was "severely injured" and  
16 the Complaint also stated:

17 It is impossible at this time to know the full nature, extent, severity and duration of  
18 said injuries, but they are alleged to be permanent, progressive, and disabling in  
19 nature; the Plaintiff has incurred and will likely continue to incur medical expenses  
20 and other expenses to be proved at the time of trial; further, Plaintiff has also suffered  
lost earnings, a reduction of earning capacity, and impairment of his ability to enjoy  
life.

(Complaint ¶ 2.4)


21 The removal provision (28 U.S.C. § 1446(b)) provides that if the initial pleading is not  
22 removable, the cause of action may be removed within 30 days of service of an amended pleading,  
23 motion, order or other paper from which it may first be ascertained that the case has become  
24 removable. Where a complaint is silent or unclear as to the amount of damages sought by the  
25

1 plaintiff, the Defendant must allege and “bears the burden of actually proving” that the amount in  
2 controversy exceeds \$75,000. *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9<sup>th</sup> Cir. 1992). A plaintiff  
3 may demonstrate that it is “facially apparent” from the complaint that the claims likely exceed  
4 \$75,000. (*see, e.g. Lockett v. Delta Airlines, Inc.*, 171 F.3d 295, 298 (5<sup>th</sup> Cir. 1999)(Plaintiff alleged  
5 property damage, travel expenses, an emergency ambulance trip, a six-day stay in the hospital, pain  
6 and suffering, humiliation, and temporary inability to do housework after the hospitalization.)).

7 In Comb’s case, Progressive removed asserting that the amount in controversy, exclusive of  
8 interest, exceeds \$75,000, and considering the injuries alleged, it is reasonable to accept  
9 Progressive’s statement as true given that Combs alleges his injuries to be “permanent, progressive,  
10 and disabling” and that he “has also suffered lost earnings, a reduction of earning capacity, and  
11 impairment of his ability to enjoy life” as a result of the collision. Defendant did not timely remove  
12 this case and it must be remanded to Pierce County Superior Court.

13 NOW, THEREFORE, IT IS ORDERED: The Court, having considered the parties’  
14 submissions in response to the Court’s Order To Show Cause [Dkt. # 4], concludes that this matter  
15 was untimely removed and this case is hereby REMANDED to Pierce County Superior Court.

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17 DATED this 3<sup>rd</sup> day of November, 2008.

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22 FRANKLIN D. BURGESS  
23 UNITED STATES DISTRICT JUDGE  
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